No. 05-1307

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IN THE

Supreme Court of the United States

BANCO PANAMERICANO, INC., CHIPLEASE, INC., and LEON GREENBLATT,

Petitioners,

v.

CHASTANG LANDFILL, INC., WASTE MANAGEMENT HOLDINGS, INC., CONSORTIUM SERVICE MANAGEMENT GROUP, and JAY A. STEINBERG, CHAPTER 7 TRUSTEE FOR THE ESTATE OF RESOURCE TECHNOLOGY CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

GREGORY J. JORDAN
Counsel of Record
EVANGELOS J. GEGAS
PETER J. SCHMIDT
DYKEMA GOSSETT PLLC
10 South Wacker Drive
Suite 2300
Chicago, IL 60606
(312) 876-1700

Attorneys for Petitioners

201961

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION	1
The Section 363(f) "Floating Lien" Issue Is Appropriate For Review	1
Respondents' Citations and Argument on the Question of Abandonment Are Off the Mark	2
The Assumption of the Chastang Contract Does Not Alter the Analysis	4
There Is No Conflict Between Section 554 and Section 365 Under Petitioners' Reading	5
CONCLUSION	7

TABLE OF CITED AUTHORITIES

Page

Cases:

Cheadle v. Appleatchee Riders Assn. (In re Edward Hill Lovitt), 757 F.2d 1035 (9th Cir. 1985) 5

In re Argonaut Financial Services, Inc., 164 B.R. 107 (N.D. Cal. 1994) 3

In re Bernard, 69 B.R. 13 (Bankr. D. Haw. 1986) .. 3, 4

In re Rickel Home Centers, Inc., 209 F.3d 291 (3d Cir. 2000) 1

Midlantic National Bank v. New Jersey Dept., 474 U.S. 494 (1986) 6

Northview Motors, Inc. v. Chrysler Motors Corporation, 186 F.3d 346 (3d Cir. 1999) 1

Statutes:

11 U.S.C. § 363 (2005) ..... *passim*

11 U.S.C. § 365 (2005) ..... *passim*

11 U.S.C. § 541 ..... 1, 7

11 U.S.C. § 554 ..... *passim*

INTRODUCTION

Chastang Landfill, Inc., Waste Management Holdings, Inc. and Consortium Services Management Group (collectively, the "Respondents") have filed a Brief in Opposition (the "Response") to the Petition for Certiorari filed by Banco Panamericano, Inc., Chiplease, Inc. and Leon Greenblatt (collectively, the "Petitioners"). In the Response the Respondents misstate the holdings of the federal courts on the issue on abandonment v. assumption or rejection of contracts under the Bankruptcy Code. Respondents raise a red herring regarding the prior assumption by the Chapter 11 Trustee for the Estate of Resource Technology Corporation (the "Trustee") of the executory contract at issue. The Respondents fail to address Petitioners' argument regarding the sale of the debtor's assets under Section 363 of the Bankruptcy Code (11 U.S.C. § 363), and misread the opinion of the Seventh Circuit below.

The Section 363(f) "Floating Lien" Issue Is Appropriate For Review

Contrary to the Respondents' assertion, the argument regarding the Seventh Circuits finding on the Section 363(f) issue is not a *non-sequitor*. Section 363(f) applies to the underlying transaction. The Respondents argue that Section 363(f) does not apply because the Trustee was not selling property, but rather was "conceding termination of a contract on connection with the settlement of a dispute. However, settlement of a claim that is property of the estate will constitute a sale of such property under Section 363(f). *Northview Motors, Inc. v. Chrysler Motors Corporation*, 186 F.3d 346 (3d Cir. 1999). Contracts are included as property of the estate under § 541. *In re Rickel Home Centers, Inc.*, 209 F.3d 291 (3d Cir. 2000). Therefore, the Trustee's

settlement with Chastang, which included the termination of the gas rights agreement, necessarily implicates Section 363(f).

The focus of the Petition regarding the Section 363(f) issue was on the 7th Circuit's determination that the Petitioners held a floating lien on all the assets of the Debtor, and that such a lien is not entitled to the protections of Section 363(f) of the Code. As noted in the Petition, Section 363(f)(3) bars a creditor from selling assets outside the ordinary course of business, if the sale will not generate funds sufficient to satisfy all liens against the property. The Court of Appeals ruled that Section 363(f)(3) only applies to liens on specific assets. Liens on all of a debtor's assets, such as that held by the Petitioners, which the Court of Appeals termed a "floating lien," are not entitled to the protections of Section 363(f)(3), according to the Court of Appeals. The 7th Circuit's interpretation of Section 363(f)(3) severely restricts the protections of that section, to the great detriment of those persons and entities willing to lend to distressed or bankrupt companies, is antithetical to the concept of secured transactions and the Code's respect for the bargained for protections of secured creditors, and conflicts with the unambiguous language of Section 363(f)(3). Respondents do not address these issues. Its application will effect billions of dollars in bankruptcy cases.

Respondents' Citations and Argument on the Question of Abandonment Are Off the Mark

Respondents misstates precedent when they claim that the federal courts "agree that rejection under Section 365, not abandonment under Section 554, provides the mechanism for removing burdensome executory contracts from an estate." (Response, p. 4.) The cases cited by the Respondents

do not involve questions of rejection of executory contracts as opposed to abandonment of such contracts. Those cases simply involve assumption or rejection of executory contracts under Section 365. None of the cases cited by Respondents address the legal question at issue in this case. The Petitioners are not claiming that contracts cannot be handled through 365. Petitioners are only stating that contracts can be handled through Section 365 or Section 554 of the Bankruptcy Code (11 U.S.C. § 554). Section 365 grants bankruptcy trustees the power to assume or reject executory contracts, but in addition a trustee has the power of abandonment under Section 554.

Respondents focus on language in the cited cases that indicates that the power to assume or reject under Section 365 is "based on" or an "extension of" a trustee's power to abandon burdensome property. This language in no manner resolves the question presented herein. If anything, it supports Petitioners. It indicates that the procedures available to a trustee under Section 365 are in addition to those provided under the broad, expansive language of Section 554 and Section 541 of the Bankruptcy Code (11 U.S.C. § 541). In situations where a trustee is faced with a burdensome contract and no other means of disposing of it, the trustee can reject under Section 365. In situations, such as that presented in the present case, where a secured creditor is willing to pay into the bankruptcy estate an amount sufficient to make abandonment more attractive than rejection, the trustee can abandon under Section 554. Section 554 is an alternate means of dealing with contracts that may be burdensome to the estate.

Respondents fail to distinguish the case law relied upon by the Petitioners. *In re Argonaut Financial Services, Inc.*, 164 B.R. 107 (N.D. Cal. 1994) and *In re Bernard*, 69 B.R. 13 (Bankr. D. Haw. 1986) both support the Petitioners'

interpretation of Section 554. The Respondents attempt to distinguish these cases on the assertion that the courts' comments were "based on equating rejection with termination." Only the *Bernard* opinion made that comparison, and in neither case was that relevant to the courts' statements that abandonment under Section 554 is available for contracts.

Petitioners raised the point that contracts that are neither assumed nor rejected "ride-through" the bankruptcy, either vesting in the reorganized debtor in case of a successful reorganization, or in the pre-petition debtor. The Respondents argue that such a ride-through is not an abandonment under Section 554. However, under Section 554(c), any property not administered at the closing of a case is abandoned to the debtor. Therefore, the ride-through does constitute an abandonment. The key point in this discussion is that contracts can be abandoned, through failure to assume or reject, and so Section 365 is not the exclusive means for a trustee to deal with a contract.

The Assumption of the Chastang Contract Does Not Alter the Analysis

The Respondents raise a red herring in their brief: that the assumption of the Chastang contract, prior to the settlement with the Trustee, makes review by this Court inappropriate. In fact, this point benefits Petitioners' cause. The Respondents claim the assumed nature of the contract weighs against granting certiorari, but provide no basis. The Respondents cite to the 7th Circuit's opinion out of context. The 7th Circuit was stating that abandonment would been a breach and would have led to a loss of any right the debtor would have had to the gas. While the 7th Circuit seemed to

misunderstand the nature of abandonment under Section 554 (equating it with repudiation under non-bankruptcy law), the important fact is that if the contract were abandoned under Section 554, it would pass to the pre-petition debtor, and would still have been subject to the Petitioners' security interests, regardless of any issues of breach.

Respondents have cited to *Cheadle v. Appleatchee Riders Assn. (In re Edward Hill Lovitt)*, 757 F.2d 1035 (9th Cir. 1985). In that case, the court noted that because executory contracts and leases involve future liabilities as well as rights, an affirmative act of assumption is required of the trustee to bring the property into the estate. If anything, then, the fact that the Chastang contract had been assumed strengthens the argument that the contract was property of the estate and subject to abandonment under Section 554. The trustee took the affirmative act of assuming the Chastang contract, bringing the contract into the estate as property of the debtor, and the Trustee therefore had the right to abandon that asset. The Trustee advised the Bankruptcy Court of his preference for the Petitioners' settlement offer. Despite the Trustee's determination that the best interests of the estate lie with abandonment of the contract, the Bankruptcy Court's misreading of Section 554 forced the Trustee to settle with the Respondents on less favorable terms.

There Is No Conflict Between Section 554 and Section 365 Under Petitioners' Reading

Respondents claim that Petitioners' reading of the Code would create a statutory conflict between Section 365 and Section 554. Respondents claim that Section 554 makes no mention of contracts, while Section 365 expressly deals with contracts, and that the specific language of Section 365 regarding contracts overrules the general language of Section 554.

First, there is no conflict between the two because they are not mutually exclusive. Section 365 provides a means to assume or reject an executory contract. Section 554 provides a means for a bankruptcy estate to disclaim ownership in a burdensome contract and thereby transfer the rights back to the pre-petition debtor. Moreover, as noted in the Petition, the Seventh Circuit did not focus on the alleged conflict between Section 554 and Section 365; rather, it found that 1) while a contract right might be property of the estate, performance obligations under a contract are not property of the estate, and 2) if the contract right was abandoned, it would disappear, along with the Petitioners' security interest. The Seventh Circuit stated "[a] right that is abandoned is gone. Once [the Debtor's] right to harvest gas disappears, the entitlement reverts to the landfill's owner—Chastang."[1]

Respondents have cited to the dissent in *Midlantic National Bank v. New Jersey Dept.*, 474 U.S. 494 (1986), for the fact that prior to 1978, abandonment was not a statutory provision, unlike the assumption and rejection provisions of Section 365. Therefore, it is logical to assume that if Congress created a new statutory provision that could potentially conflict with an existing one, Congress would have put in language excluding contracts from Section 554. The dissent in *Midlantic* states that there is no limitation on the power of abandonment under Section 554, and that Congress could have exempted certain situations (such as environmentally harmful property in the Midlantic case) if it wished to remove such situations from the application of the statute.

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1. Actually, the Seventh Circuit misstates the effect of abandonment. The effect is that it vests the interest in the pre-petition debtor or in the reorganized debtor.

The Petitioners' interpretation is supported by the express language of the Code. Section 554 states broadly that "any property of the estate" may be abandoned. Section 541 uses expansive language to include broad scope of assets within property of the estate. Section 541 expressly excludes from estate property any interest of the debtor in a lease of non-residential real property that terminated pre-petition. Congress knew how to limit the definition of property of the estate as regards contracts. The inclusion of contracts into property of the estate and the language of Section 554 that "any property of the estate" can be abandoned leaves only the conclusion that contracts are subject to abandonment under Section 554.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY J. JORDAN
Counsel of Record
EVANGELOS J. GEGAS
PETER J. SCHMIDT
DYKEMA GOSSETT PLLC
10 South Wacker Drive
Suite 2300
Chicago, IL 60606
(312) 876-1700

Attorneys for Petitioners